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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING.

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Comes Now the Petitioner, Cyrus Higginson, on behalf of himself and all other former landowners, or heirs, successors and assigns thereof, of thirty-six thousand (36,000) acres, namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky, and respectfully requests this Court to grant him rehearing on his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review its Judgment affirming the United States District Court for the Western

District of Kentucky, Owensboro Division, which District Court purportedly entered an Order sustaining a Motion by the Defendant-Respondent (hereinafter usually referred to as the Government) to dismiss Petitioner's cause of action.

The Petitioner further moves the Court to waive the provisions for finality of litigation as set forth in Rule 58 (4), of this Court's Revised Rules, and prays the Court to apply the Rule herein as established and expressed in **Cahill v. New York, N. H. & H. R. Co.**, 351 U. S. 183, 76 S. Ct. 758, 100 L. ed. 1075 (1956); **United States v. Ohio Power Co.**, 353 U. S. 98, 76 S. Ct. 652, 1 L. ed. 2d 683 (1957); **Gondeck v. Pan American World Airways, Inc.**, 382 U. S. 25, 86 S. Ct. 153, 15 L. ed. 2d 21 (1965).

And upon the granting of this Motion for Leave to File Petition for Rehearing, the Petitioner moves the Court to grant the Petition for Rehearing, to vacate the Order denying Certiorari, to grant the Petition for Certiorari, and to remand this case to the Court of Appeals with directions to vacate its judgment and to remand this cause to the District Court for further proceedings.

ORDER DENYING WRIT OF CERTIORARI.

This Court on March 4, 1968, denied Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The Court's Memorandum Opinion is reported at 19 L. ed. 2d 1137.

ORDERS EXTENDING TIME, AND MOTIONS FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING.

An Order granting to the Petitioner, an Extension of Time in which to file a Petition for Rehearing, to and to include April 19, 1968, was entered by this Court on March 29, 1968, and appended to the Petition for Rehearing (Pet. Reh. App. A, p. A-1). On April 19, 1968, the Petitioner

filed with this Court an Application requesting an additional extension of time, to and to include April 26, 1968, in which to file his Petition for Rehearing (Pet. Reh. App. B, p. A-2) and on April 25, 1968, counsel for the Petitioner received the Order granting the requested additional extension of time, to and to include April 26, 1968, in which to file a Petition for Rehearing (App. A, p. A-1).

On April 25, 1968, the Petitioner forwarded to this Court, by mailing air mail, special delivery, postage prepaid, an Application requesting an additional extension of time, to and to include May 1, 1968, in which to file a Petition for Rehearing. Counsel for the Petitioner was subsequently advised by the Chief Deputy Clerk of this Court that the said Application was not received until April 29, 1968, which was for an additional extension of time in which to file the Petition for Rehearing, which Petition by virtue of the prior Order, was due on April 26, 1968. The Petition for Rehearing relative to this Motion was received by the Court on April 27, 1968, hence one (1) day too late.

REASONS FOR GRANTING PETITION FOR REHEARING.

For good cause for granting Rehearing herein the Petitioner will show unto the Court:

(1) That there has occurred intervening circumstances of a substantial nature and such as to have a controlling effect.

(2) That there are other substantial grounds available to the Petitioner although not previously presented which are of such importance fundamentally and economically both to Petitioner, and the people of the Commonwealth of Kentucky to unequivocally justify application of the established doctrine that *"the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of the rules of this Court."*

(3) That the Petition for Rehearing, heretofore tendered on April 27, 1968, sets out substantial grounds for granting the Petition for Rehearing and for a Writ of Certiorari.

Facts on Which Petitioner's Motion Is Based.

The facts on which Petitioner's Motion is based will be stated in, as nearly as possible, a chronological arrangement for the convenience of this Court in following the sequence of events leading up to the present standing of the case.

On April 25, 1965, Cyrus Higginson, Petitioner herein, brought a class action under Rule 23 (a) (b) of the Federal Rules of Civil Procedure in the United States District Court for the Western District of Kentucky, Owensboro Division, against the United States of America, on the behalf of himself, and approximately 5,000 other former landowners, of approximately 36,000 acres of land comprising the United States Army Garrison of Camp Breckenridge, Morganfield, Kentucky.

A portion of the land in question was acquired through actions in Condemnation Proceedings filed by the United States of America commencing on February 12, 1942, and ending on July 12, 1948.

1. Intervening Circumstances of a Substantial Nature.

Since the denial of Petitioner's Writ of Certiorari, and the tendering of the Petition for Rehearing additional information or facts have been made known to this counsel which unquestionably constitute intervening circumstances of a substantial nature and such as to have a controlling effect. It is now apparent that the vast majority of the land in question was acquired by the government through voluntary negotiations with the landowners, even though the mass intanglement of records purport other-

wise. *This recent event raises a material question of fact since the voluntary negotiations of contracts between the government and the landowners presents such factual questions which obviously can be resolved only upon the basis of evidence as to the conditions and circumstances surrounding said transactions at the time of their occurrence.*

It is submitted that the foregoing intervening circumstances of recently made known facts represent substantial grounds entitling Petitioner to the relief requested. And even if the Court should deem otherwise, Petitioner still submits that irregardless the aforegoing facts will warrant granting the Petition for Rehearing and for a Writ of Certiorari.

Petitioner's cause embodied an orginial Complaint and three amended complaints which were based upon 8 separate grounds: (1) The landowners' right to repurchase their property under the Surplus Property Act of 1944; (2) An implied contract to recover reasonable rental value of the land used by the government from the time it ceased to use said land for the purposes which it was taken; *(3) The mineral rights were not acquired by the government, by reason of their (the exceptions and) reservations contained in the Deeds;* (4) The property was taken without due process of law, and without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution; (5) The government did not acquire a fee simple absolute interest in the property; (6) That fraud and misrepresentation were committed by agents, servants and employees upon which the landowners relied in conveying their land; (7) The land became surplus property under the War Surplus Act, 50 U. S. C. A. 1611, prior to its expiration and repeal, but that the government intentionally, deliberately and arbitrarily withheld said property; *(8) The interest acquired by the government auto-*

matically reverted back to the landowners upon the abandonment and cessation of the use of the land for the acquired purpose.

2. Substantial and Controlling Points Were Left Undecided Below.

The District Court in its Opinion (Pet. Reh. App. F, p. A-11) entered on September 9, 1965, *did not pass upon, or make any findings as to, whether the mineral rights were acquired by the government, and particularly as to how the government could have obtained the mineral rights when a majority of the conveyances specifically excepted and reserved all mineral rights to the landowner.* An example of said reservations and exceptions contained in the Deeds entered into by the landowners and the government through voluntary negotiations is appended to this Motion (App. B, p. A-2).

The grounds mentioned above, and designated as (4), (7) and (8), which contained issues of major and substantial importance in Petitioner's cause were also not passed on or mentioned by the District Court in its Opinion.

The foregoing issues or questions upon which the District Court failed to make a finding were properly presented to the Court of Appeals, where, again, no findings or determinations were made. The Opinion of the Court of Appeals is appended to the Petition for Certiorari (Pet. App. A, pp. i-xvii).

The cause herein has not been irrevocably closed in that no Motion has ever been presented to the District Court to implement the mandates of this Court or of the Court of Appeals.

CONCLUSION.

For the reasons set forth in this Motion, and in the Petition for Rehearing which has been previously tendered to the Court, as well as in the Petition for Certiorari pre-

viously filed, the Petitioner respectfully requests that leave be granted to file the Petition for Rehearing, to vacate the Order denying Certiorari, to grant the Petition for Certiorari, and to remand this case to the Court of Appeals with directions to vacate its Judgment and to remand this cause to the District Court for further proceedings.

Respectfully submitted,

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BROWN, SLEDD & McCANN.

Certificate of Counsel.

Pursuant to Rule 58, as amended, I hereby certify that the foregoing Motion for Leave to File, and the previously filed Petition for Rehearing, are presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58, as amended.

.....

Jerry W. Nall,
Attorney for Petitioner.